A

KESATUAN KEBANGSAAN PEKERJA-PEKERJA HOTEL, BAR & RESTAURAN, SEMENANJUNG MALAYSIA

v.

B

YB MENTERI SUMBER MANUSIA, MALAYSIA & ORS

HIGH COURT MALAYA, KUALA LUMPUR
MOHD ZAWAWI SALLEH J
[JUDICIAL REVIEW NO: R2(4)-25-322-2007]
C 11 AUGUST 2010

ADMINISTRATIVE LAW: *Exercise of administrative powers - Judicial review - Decision of Minister not to accord recognition to applicant trade union - Whether Minister under obligation to provide a*
D *reasoned decision - Industrial Relations Act 1967, s. 9(3) - Trade Unions Act 1959, s. 26(3) - Trade Unions Regulations 1959, reg. 65(2)*

LABOUR LAW: *Trade union - Recognition - Applicant requesting that membership check be done by way of membership verification as opposed*
E *to secret ballot - Reasons for the same - Whether DGTU bound to comply with wishes of applicant - Whether DGTU acted impartially in carrying out membership check - Trade Unions Regulations 1959, reg. 62*

LABOUR LAW: *Trade union - Recognition - Minister advising 4th respondent not to accord recognition to the applicant - Reasons for the*
F *same - Whether Minister under an obligation to give reasons for his decision - Whether Minister exercised his discretion properly - Factors to consider - Industrial Relations Act 1967, s. 9(5)*

LABOUR LAW: *Trade union - Recognition - Whether a membership*
G *check by way of secret ballot would produce a result not intended by s. 9(3) IRA and reg. 4(1)(c) Industrial Relations Regulations 1980 - Industrial Relations Act 1967, s. 9(3) - Industrial Relations Regulations 1980, reg. 4(1)(c)*

H The union ('applicant') submitted a claim for recognition to the Hotel ('4th respondent') and was informed by the latter that it would be seeking assistance from the Director General of Industrial Relations ('DGIR') to conduct a membership check by way of secret ballot to determine the eligibility of the applicant to
I represent the employees of the 4th respondent. The DGIR instructed the Director General of Trade Union ('DGTU') to

conduct a membership check. The DGTU then wrote to the applicant seeking their views on whether the membership check should be conducted by way of secret ballot and the latter responded negatively. The DGTU nevertheless proceeded to conduct a secret ballot and it was found that only 19.6% of the 4th respondent's employees had been members of the applicant. Thus the 1st respondent (Minister) decided that the 4th respondent ought not to accord recognition to the applicant ('impugned decision'). The applicant challenged the impugned decision and sought for judicial review of the same. There were four main issues that arose for determination before this court. The first had been whether the decision by the 2nd respondent to conduct a membership check by way of secret ballot had been unfair and prejudicial to the applicant, the second had been whether the secret ballot process had defeated the object, intent and purpose of s. 9(3) of the Industrial Relations Act 1967 ('IRA') and s. 26(3) of the Trade Unions Act 1959 ('TUA'), the third had been whether reg. 65(2) of the Trade Unions Regulations 1959 had offended arts. 5, 8 and 10 of the Federal Constitution and the last had been whether the alleged failure on the part of the 1st respondent to provide reasons or acceptable reasons on the facts of the present case had been an error of jurisdiction on its part.

Held (the applicant's application dismissed with costs):

(1) Regulation 62 of the Trade Unions Regulations had provided for two methods of conducting a membership check, *ie*, either by a membership verification exercise or by way of secret ballot. The DGTU had chosen the latter. The law had not required the DGTU to act in a manner dictated to by the applicant. The DGTU by not acceding to the applicant's request had merely been exercising its discretion pursuant to TUA. DGTU as a third party could not possibly have had any interest in the dispute between the applicant and the 4th respondent. The applicant had not at any time challenged the impartiality of the DGTU in its affidavits. (paras 12 & 13)

(2) The secret ballot had become the bedrock of our democratic election process in Malaysia, as well as in numerous other democracies around the world. It was the fairest way to guarantee the rights of employees to confirm their membership

of a union or to freely choose whether or not they wish to be represented by a union. It allowed for a private, confidential vote by the employees based on the principles of our system of democracy. Thus the applicant's contention that a secret ballot would not produce a result as intended by s. 9(3) of the IRA and reg. 4(1)(c) of the Industrial Relations Regulations 1980 could not be accepted. (paras 15 & 17)

(3) There had been little merit in the applicant's submission that reg. 65(2) of the Trade Unions Regulations 1959 had the effect of making the applicant's constitutional right of association "ineffective or illusory". Regulation 65(2) of the Trade Unions Regulations had been in existence since 1959 and the Court of Appeal had made a clear decision on the issue in the case of *Minister of Human Resources & Ors v. National Union of Hotel, Bar and Restaurant Workers Semenanjung Malaysia & Anor Appeal*, as far back as 1997. (paras 19 & 23)

(4) The IRA and the TUA had not imposed a duty on the 1st respondent to provide a reasoned decision. However the 1st respondent had in paras. 21 and 22 of his affidavit in reply given his reasons as to why the 4th respondent should not accord recognition to the applicant. The affidavits of the 1st, 2nd and 3rd respondents had all disclosed that the 1st respondent had acted fairly, properly and reasonably in the exercise of his discretion under s. 9(5) of the IRA, had taken all relevant matters into consideration and had sufficient evidence and material before him for the purposes of arriving at his decision. (paras 29 & 31)

(5) The applicant essentially challenged the impugned decision as infringing arts. 5, 8 and 10 of the Federal Constitution but the ground raised by the applicant had already been ventilated and decided by the superior courts. Thus this court had been bound by the principles of *stare decisis*. (para 33)

Case(s) referred to:

Dewan Undangan Negeri Kelantan & Anor v. Nordin Salleh & Anor [1992] 2 CLJ 1125; [1992] 1 CLJ (Rep) 72 SC ***(refd)***

Food Corporation Of India Staff Union v. Food Corporation Of India And Others, AIR 1995 SC 1344 ***(refd)***

Gissel Packing, 395 US ***(refd)***

Joseph Puspam v. Menteri Sumber Manusia, Malaysia & Anor [2001] 4 CLJ 252 CA ***(refd)***

Kelab Lumba Kuda Perak v. Menteri Sumber Manusia, Malaysia & Anor [2005] 3 CLJ 517 CA ***(refd)***
Ketua Pengarah Kesatuan Sekerja Malaysia v. Evergreen Laurel Hotel (M) Sdn Bhd [2010] 8 CLJ 413 CA ***(refd)***
Lee Chew Mee v. Ng Kok Kwang & Anor [2010] 8 CLJ 192 HC ***(refd)***
Maneka Gandhi v. Union of India AIR 1978 SC 597 ***(refd)***
Menteri Sumber Manusia & Ors v. Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar dan Restaurant Semenanjung Malaysia & Another Appeal [1998] 1 CLJ 215 CA ***(refd)***
Minister of Labour, Malaysia v. Sanjiv Oberoi & Anor [1990] 1 CLJ 44; [1990] 1 CLJ (Rep) 200 SC ***(refd)***
NLRB v. Flomatic Corp, 347 F 2nd 74 ***(refd)***
NLRB v. SS Logan Packing Co, 386 F 2nd 562 ***(refd)***
NLRB v. Village LX, Inc, 723 F 2nd 1360 ***(refd)***
Ramatex Textiles Industrial Sdn Bhd v. Menteri Sumber Manusia Malaysia & Anor [2004] 8 CLJ 577 HC ***(refd)***
Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2010] 3 CLJ 507 FC ***(refd)***

Legislation referred to:
Federal Constitution, arts. 5, 8, 10(1)(c)
Industrial Relations Act 1967, ss. 9(3)(c), (5)
Industrial Relations Regulations 1980, reg. 4(1)(c)
Rules of the High Court 1980, O. 53 r. (3)(2)
Trade Unions Act 1959, s. 26
Trade Unions Regulations 1959, reg. 65(2)

For the applicant - Dato' Ambiga Sreenevasan (Shireen Selvaratnam with her); M/s Sreenevasan
For the 1st, 2nd & 3rd respondent - Samsul Bolhasan (Nadia Tajuddin with him); AG's Chambers
For the 4th respondent - A Ramadass (M Jothiletchimy with him); M/s Ramadass & Assocs

Reported by Sharmini Pillai

JUDGMENT

Mohd Zawawi Salleh J:

Introduction

[1] The applicant in this application challenged the decision of the first respondent handed down on 19 September 2007 that the fourth respondent need not recognize the applicant pursuant to the claim for recognition filed by the applicant on 22 February 2006 ("the impugned decision").

[2] The prayers in the amended application for judicial review (encl. 17) dated 1 November 2007 were for following reliefs:

(a) A declaration that:

(i) The secret ballot process defeats the object, intent and purpose of s. 9(3)(c) of the Industrial Relations Act 1967 and s. 26(3) of the Trade Unions Act 1959;

(ii) Regulation 65(2) of the Trade Unions Regulations 1959 offends arts. 5, 8 and 10 of the Federal Constitution.

(b) An order of *certiorari* to remove into the High Court and to quash the decision dated 19 September 2007 handed down by the first respondent wherein the first respondent decided that no recognition be accorded to the applicant, the National Union of Hotel, Bar & Restaurant Workers, Peninsular Malaysia, by the fourth respondent;

(c) An order of *mandamus* compelling the first respondent to direct that the membership check be conducted by way of verification exercise by the second respondent in relation to the applicant's notice of claim for recognition dated 22 February 2006;

(d) All necessary and consequential relief, orders and/or directions; and

(e) Costs.

[3] The grounds in support of the application are appearing in the statement pursuant to O. 53 r. (3)(2) of the Rules of the High Court 1980 and those grounds may be summarized as follows:

(a) The applicant alleged that the first respondent has acted without or in excess of its jurisdiction in refusing recognition on the basis of the secret ballot carried out on 13 December 2006;

(b) The applicant also alleged that the first respondent failed to provide reasons or grounds to justify its decision that no recognition be accorded to the applicant by the fourth respondent;

(c) The applicant further alleged that the first respondent has failed to consider sufficiently or at all the objection of the applicant and the purpose and intention of the provisions of s. 9(3)(c) of the Industrial Relations Act 1967 [Act 77] and reg. 4(1)(c) of the Industrial Relations Regulations 1980 which do not envisage a secret ballot process for purposes of a membership check;

(d) The applicant also claimed that first respondent had failed to take into account sufficiently or at all that:

(i) Regulations 65(2) of the Trade Unions Regulations 1959 is *ultra vires* the Industrial Relations Act 1967. [para d(i)];

(ii) Regulation 65(2) of the Trade Unions Regulations 1959 offends arts. 5, 8 and 10 of the Federal Constitution. [para d(ii)];

(iii) The secret ballot results showed that 19.16% of the voters were members of the applicant because those who did not vote were counted as votes for the fourth respondent. [para d(iii)];

(iv) Only a membership verification exercise conducted by an independent third party can ascertain who are members of the applicant. [para d(v)];

(v) When it took into accounts matters which it ought not have taken into. [para e];

(vi) When it failed to take into account relevant matters; and

(vii) When it arrived at a decision which was perverse or devoid of plausible justification in deciding that no recognition be accorded to the union by the fourth respondent. [para g].

Facts Of The Case

[4] The facts relevant to the application have been set out in paras. 4 to 21 of the applicant's affidavit and may be summarized as follows:

(a) On 22 February 2006, the union ("applicant") submitted a claim for recognition to the hotel ("fourth respondent") (See: exh. U-2/p. 8 of union's first affidavit);

A (b) On 10 March 2006, the fourth respondent informed the applicant that it had sought the assistance of the Director General of Industrial Relations ("DGIR") to facilitate membership check by way of secret ballot to determine the eligibility of the applicant to represent the employees of the
B fourth respondent. (see: exh. U-3/p. 10 of union's first affidavit);

(c) After receipt of all relevant documents from the parties, on 17 July 2006, the DGIR instructed the Director General of
C Trade Union ("DGTU") to conduct a membership check;

(d) On 24 August 2006, the DGTU wrote to the applicant seeking their views on the fourth respondent's request that the membership check be conducted by way of a secret ballot (See: exh. U-7/p. 22 of union's first affidavit);
D

(e) On 5 September 2006, the applicant wrote to the DGTU informing them that a secret ballot will not produce a result as intended by s. 9(3)(c) of the Industrial Relations Act 1967 and reg. 4(1) (c) of the Industrial Relations Regulations 1980.
E The applicant therefore requested that a membership verification exercise be conducted (See: exh. U-8/p. 23 of union's first affidavit);

(f) On 9 November 2006, the DGTU informed the parties that a
F secret ballot will be conducted (See: exh. U-9/p. 24 of union's first affidavit);

(g) The DGTU then called for a meeting to be held on 27 November 2006 to discuss the matters pertaining to the
G proposed secret ballot. At this meeting, the applicant objected to the formula for calculating the results of the secret ballot and accordingly refused to sign the memorandum of agreement prepared by the DGTU (See: exh. U-12/p. 27 of union's first affidavit);

H (h) The secret ballot was conducted on 13 December 2006;

(i) The parties were subsequently informed that the results of the secret ballot showed that only 19.6% of the fourth respondent's employees were members of the applicant as at
I 22 February 2006 (See: exh. U-14/p. 31 of union's first affidavit);

(j) The Minister ("first respondent") accordingly decided on 19 September 2007 that the fourth respondent ought not accord recognition to the union (See: exh. U-17/p. 35 of union's first affidavit).

Issues To Be Decided

[5] The issues to be decided by the court are as follow:

(a) Whether the decision by the second respondent to conduct a membership check by way of secret ballot instead of a membership verification exercise was unreasonable, unfair and prejudicial to the applicant;

(b) Whether the secret ballot process defeats the object, intent and purpose of s. 9(3) of the Industrial Relations Act 1967 and s. 26(3) of the Trade Unions Act 1959;

(c) Whether reg. 65(2) of the Trade Unions Regulations 1959 offends arts. 5, 8 and 10 of the Federal constitution; and

(d) Whether the alleged failure to provide reasons or acceptable reasons on the facts of the present case is an error of jurisdiction on the part of the first respondent.

Discussion

Issues (a) And (b)

[6] The applicant's argument is that a majority of its workmen are members of its union and therefore the fourth respondent ought to recognise the applicant as being able to represent its members, through collective bargaining, to negotiate and conclude the terms and conditions of their employment with the fourth respondent.

[7] The fourth respondent then has the option, pursuant to s. 9(3) of the Industrial Relations Act 1967, to apply to the DGIR to ascertain whether the workmen in respect of whom recognition is being sought are members of the applicant. The DGIR, pursuant to s. 26(3) of the Trade Union Act 1959, requested the DGTU to carry out a membership check in such a manner as prescribed by the regulations in order to ascertain the percentage of workmen in respect of whom recognition is being sought, who are members of the union.

[8] The DGTU, on 24 August 2006, wrote to the applicant seeking its views on the fourth respondent's request for a secret ballot. By its letter dated 3 January 2006, the applicant requested for the membership check to be conducted by way of a verification exercise instead of a secret ballot. The applicant informed the DGTU that a secret ballot will not be able to produce the results intended by s. 4(1)(c) of the Industrial Relations Act 1969 and reg. 4(1)(c) of the Industrial Relations Regulations 1980. However, the fourth respondent preferred a secret ballot.

[9] The applicant contended that notwithstanding the applicant's preference for the verification exercise, the DGTU decided that a secret ballot ought to be conducted instead of a verification exercise. According to the applicant, having asked for their view on the proposed method to conduct the membership check and after informing the DGTU of the applicant's view, the applicant had acquired a legitimate expectation that a verification exercise would be conducted. The DGTU's decision not to carry out a verification exercise amounts to a breach of the applicant's legitimate expectation. To support its submission, the applicant cited the case of *Kelab Lumba Kuda Perak v. Menteri Sumber Manusia, Malaysia & Anor* [2005] 3 CLJ 517 at 535 (CA).

[10] The main point of grievance of the applicant is that the decision to conduct a secret ballot produced a result that was unfair and unjust to the applicant as 32 of the 38 voters who attended to vote, voted in favour of the applicant. This is because, based on the formula prescribed in reg. 65(2) of the Trades Union Regulations, the applicant does not require majority as the 129 voters who did not turn up to vote are counted as having voted in favour of the fourth respondent. It is absurd that even the 1 spoilt vote was counted as a vote for the fourth respondent.

[11] In the circumstances, it was submitted by the applicant that the decision to conduct a secret ballot is outrageous in its defiance of logic and unreasonable in the Wednesbury's sense. It follows, therefore, the first respondent's decision not to accord recognition on the basis of the secret ballot results is also irrational and unreasonable and ought to be quash by the court.

Findings Of The Court

[12] With respect, the court disagrees with the submission of the applicant. The applicant acknowledges that reg. 62 of the Trade Unions Regulations provides for two methods of conducting the membership check ie, either by membership verification exercise or by way of a secret ballot. The DGTU had chosen the option to conduct membership check by a secret ballot.

[13] In my considered opinion, the law does not require the DGTU to act in the manner dictated by the applicant. When the DGTU did not accede to the applicant's request, the DGTU was merely exercising his discretion pursuant to the Trade Union Act 1959. It is pertinent to note that the DGTU, as a third party, could not possibly have any interest in the dispute between the applicant and the fourth respondent. The DGTU would be impartial to the cause of either the applicant or the fourth respondent. The applicant did not at anytime challenge the impartiality of the DGTU in its affidavits.

[14] In a recent decision by the Court of Appeal in *Ketua Pengarah Kesatuan Sekerja Malaysia v. Evergreen Laurel Hotel (M) Sdn Bhd* [2010] 8 CLJ 413, the Court of Appeal had this to say:

> [31] When the Trade Unions Act 1959 and the Trade Unions Regulations 1959 give the DGTU the discretion to choose between two modes of membership checks, it is not for the hotel or the High Court to decide on the particular mode the DGTU should adopt. The interference by the court, if at all, is only justified if the DGTU went beyond the scope of his duties by adopting a mode which is not specified or permitted by the Act, read with the Regulations, or has failed to act in good faith according to established procedure having regard to the circumstances of this particular case. Subject to these exceptions, the discretion is unfettered and belongs to the DGTU. Whereas in the instant appeal, the discretion has been exercised within the parameters of the enabling provisions, and in good faith, the court should not usurp the functions of the DGTU by substituting its own decision for that of the DGTU. The court must bear in mind that the function of the court in this category of cases is by way of judicial review only.

[32] Our view is fortified by the judgment of the Federal Court in *Electrical Industry Employees Union v. Registrar of Trade Unions & Anor* [1975] 1 LNS 34; [1976] 1 MLJ 177 FC. There, the issue was whether it was the Union or the Registrar of Trade Unions (now the DGTU) who should decide whether the workers fell within the scope of the Union. Lee Hun Hoe CJ (Borneo) (as he then was) held at p. 179 A-D rt:

> Whether a person in a related or similar industry becomes a member of a particular union is squarely a matter for the decision of the Registrar of Trade Unions. If a particular union can say it is for the Union to decide whether those in another industry might be absorbed as members of the Union, a dangerous situation would develop whereby each and every union in the country would do the same. This could produce disastrous result for the country. It is for the Union to satisfy the Registrar of Trade Unions that the Monsanto Electronics Workers Union belongs to the same or similar industry as the Union. What is sought by the originating summons is a declaratory judgment as to the Union. What is sought by the originating summons is a declaratory judgment as to the functions and powers of the Registrar of Trade Unions. I think the court must decline to exercise its discretion in making any declaration which would fetter the Registrar in the exercise of his duties imposed on him by the Ordinance. It would seem that if the Registrar of Trade Unions acted in good faith in the performance of his duties he would be protected by section 6 of the said Ordinance.

[33] At p. 1811 left *ibid*, Ong Hock Sim FJ (as he then was) expressed a similar view, ie, the court should not define and draw up guidelines for the registrar as to his functions under the Ordinance and the manner he is to carry them out. His Lordship cited with approval the judgment of Farwell J in *Thomas v. Attorney-General* [1973] 1 Ch 72, 75-78 to the effect that where the relevant Act gave the discretion to the Attorney-General to decide on the steps to be taken, the court ought not in a case of this kind to make an order which would or might have the effect of fettering the discretion vested in the Attorney-General.

[34] Another supportive view was expressed by the Federal Court through the judgment of Abdul Malek Ahmad FCJ (later PCA) in *National Union of Newspaper Workers v. Ketua Pengarah Kesatuan Sekerja, supra*, at pp 697-698. His

> Lordship cited with approval an unreported High Court decision in *The Electrical Industry Workers Union v The Honourable Minister of Labour & Power & The Registrar of Trade Unions* (MTKL Motion No. A11 of 1981) where Hashim Yeop Sani J (later CJ (M)) opined that the whole function of certiorari is aimed at the examination of the record and that, in a certiorari proceeding, the court is acting as a supervisory court and not as an appellate court and that "it is clear that the legislature has entrusted on the Registrar and the Minister the discretion to decide on the membership and representation by the union and the courts should not usurp this function and embark on a rehearing of the matter".

[15] The court disagrees with the submissions of the applicant that a secret ballot will not produce a result as intended by s. 9(3)(c) of the Industrial Relations Act 1967 and reg. 4(1)(c) of the Industrial Relations Regulations 1980. The secret ballot has become the bedrock of our democratic election process in Malaysia, as well as in those of numerous other democracies around the world. Even the UN's Universal Declaration of Human Rights recognizes the importance of periodic and genuine elections "by secret vote". The Supreme Court of India in *Food Corporation Of India Staff Union v. Food Corporation Of India And Others*, AIR 1995 SC 1344, 1995 (71) FLR 278, JT 1995 (9) SC 201 had this to say:

> The "check off system" which once prevailed in this domain has lost its appeal; and so, efforts are on to find out which other system can foot the bill. The method of secret ballot is being gradually accepted. All concerned would, however, like to see that this method is so adapted and adjusted that it reflects the correct position as regards membership of the different trade unions operating in one and the same industry, establishment or undertaking.

[16] Courts in the United States support the secret ballot as the fairest election method:

(a) In a landmark 1969 case involving a union dispute at a packing company, the Supreme Court affirmed that cards are "admittedly inferior to the election process" (See *Gissel Packing*, 395 US at 602);

A (b) The Second Circuit Court held: "It is beyond dispute that secret election is a more accurate reflection of the employers' true desires than a check of authorization cards collected at the behest of a union organizer". (See *NLRB v. Flomatic Corp*, 347 F 2nd 74, 78 (2nd Cir 1965);

B (c) The Fourth Circuit Court held: "It would be difficult to imagine a more unreliable method of ascertaining the real wishes than a "card check", unless it were an employer's request for an open show of hands. The one is no more
C reliable than the other ..." (See *NLRB v. SS Logan Packing Co*, 386 F 2nd 562 (4th Cir 1967));

(d) The Seven Circuit Court held: "Workers sometimes sign union authorization cards not because they intend to vote for the union but to avoid offending the persons who asks them to
D sign, often a fellow worker, or simply to get the person off the back ... (See *NLRB v. Village LX*, Inc, 723 F 2nd 1360, 1371 (7th Cir 1983).

[17] In my judgment, the secret-ballot process is the fairest way
E to guarantee the rights of employee to confirm his membership of a union or freely choose whether or not to be represented by a union. It allows for a private, confidential vote by employees, based on the principles of our system of democracy. Every employee should have a right to join a labour union, and an equal
F opportunity not to join. Secret ballot is in place to permit employees to freely express their desires to join a union or not, free from coercion from employers or union. Democracy in the workplace should be maintained. The secret ballot process that has been administered by DGTU since 1959 must be encouraged
G to ensure that every employee can freely express his or her desire to join a union. Malaysians get secret ballot when they choose their members of Parliament, and their members of State Assemblies – even their PTA chairman – why should they not have the same right in the workplace when they decide whether
H to be represented by union?.

[18] In the Court of Appeal case of *Kelab Lumba Kuda Perak v. Menteri Sumber Manusia Malaysia & Anor (supra)* the court endorsed that secret ballot was the most democratic way of
I determining the choice of the employees:

A secret ballot allows members to exercise their freedom of choice as to whether they wish to assign their bargaining power and freedom of contract to the Union. In contrast, a verification exercise merely involves an examination of the records furnished by the Trade Union. More importantly a verification exercise would not be able to address the issue which has been raised by the appellant in its letter of 14 March 1997 to the DGTU to ascertain the authenticity and voluntariness of the signatories in the membership rolls. The veracity of membership check by secret ballot has been expressly tested and sanctioned by the Court of Appeal in *Minister of Human Resources v. National Union of Hotel, Bar and Restaurant Workers Semenanjung Malaysia (supra)*, where the court confirmed that a membership check conducted by secret ballot does not produce an unfair result. In addition, the court also held that the membership check by secret ballot was perfectly valid and not *ultra vires* the Trade Union Act 1959.

It is our view that it is of paramount importance to ensure that all the affected employees of the appellant have a right to state their choice through secret ballot as to whether they elect to be members of the Second Respondent and therefore assign their contracting right to the Second Respondent. This right of choice is preserved under the provision of reg. 67 of the Trade Regulations 1959, which states as follows:

All workmen or any class of workmen, in respect of whom recognition is being sought who are in the employment of the employer on the date of claim shall be entitled to vote in the secret ballot. (emphasis added).

The importance of preserving the right of choice of the affected employees of the appellant in this case is well supported by the decision in the Court of Appeal's case of *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals* [1997] 1 CLJ 665 wherein it was *inter alia* held that employment is part and parcel of one's constitutional right guaranteed under arts. 5 and 8 of the Federal constitution. The order or recognition, therefore, has a serious impact to the employees' constitutional right, as it would affect their terms and conditions of employment by the collective bargaining.

Issue (c)

[19] The main contention of the applicant on issue (c) is this: Regulation 65(2) of the Trade Unions Regulations 1959 has the effect of making the applicant's constitutional right of association

A "ineffective or illusory". The said regulation which is the formula to determine the results of the secret ballot process is unfair to the applicant as voters who do not turn up to vote are counted as votes for the fourth respondent. According to the applicant, the obvious conclusion that can be drawn from the formula is that its
B object is to make it as difficult as possible for a union to get a majority in its favour thereby derogating from the constitutionality guaranteed right that citizens have freedom of association. The applicant further contended that the right of freedom of association it therefore illusory – whilst it exists, reg. 65(2) of the
C Trade Unions Regulations makes it impossible to exercise the right in the case of unions seeking recognition. In the circumstances, the fourth respondent clearly acquires an unfair advantage when the secret ballot process is adopted because of the formula prescribed in that regulation.

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[20] To support its submissions, the applicant relied on the following two passages from the judgment of the Supreme Court in *Dewan Undangan Negeri Kelantan v. Nordin Salleh* [1992] 2 CLJ 1125; [1992] 1 CLJ (Rep) 72 as to the interpretation of art.
E 10(1)(c):

> Before we embark upon a consideration of the arguments advanced by counsel on both sides, we would advert to two preliminary matters as to which, there appears to be no dispute. First, the enunciation of the right to freedom of association in
F sub-clause (1)(c) of article 10 of the Federal Constitution **means a citizen's rights to form, to join, not to join or resign from an association (see *Mian Bashir Ahmad v. The State* at page 55 para 89; *Raja Kulkami v. State of Bombay*). In *OK Ghosh v. EX Joseph***, the Supreme Court of India was of the view that
G any restrictions to dissociate from an association would make the guaranteed right under article 19(1)(c) of the Constitution ineffective and illusory.
>
> (emphasis added)
>
> Per Abdul Hamid Omar LP
>
H
> I would again agree with Bhagwati J in *Maneka Ghandi v. The Union of India* that 'the test which must be applied is **whether the right claimed is** an integral part of a named fundamental right **or partakes of the same basic nature and character as**
I **the named fundamental right** so that the exercise of such right is in reality and substance nothing but an instance of the exercise of the named fundamental right'. Applying that test, I am of the view that the right claimed by the respondents in this case, that

is, the right to leave one political party and to join another is an integral part of the fundamental right of association or at least partakes of the same basic nature and character as the freedom of association so that the exercise of that right to leave one political party and join is in reality and substance nothing but an instance of the exercise of the fundamental right of association guaranteed under article 10(1)(c) of the Federal Constitution. The object of Article XXX1A of the Kelantan State constitution may ostensibly be to curb defection from one political party to another, but its direct and inevitable consequence is the abridgement of the respondents' right of association guaranteed by the Federal Constitution. For that reason, that impugned legislation should be struck down.

(emphasis added)

Per Gunn Chit Tuan SCJ

[21] The applicant submitted that the decision in *Nordin Salleh (supra)* gave a broad interpretation of the expression "right to form association" in art. 10(1)(c). Two other issues of importance were decided in this case. Firstly, that the Malaysian Constitution should be construed with less rigidity and more generously then mere Acts of Parliament and that the constitution is *sui generis* calling for principles of interpretation of its own. This approach was reiterated and followed in *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507.

[22] Secondly, the appropriate test to be applied in determining whether a statute infringes a particular fundamental right is to assess what the direct and inevitable consequence or effect of the impugned statutory provision is on the fundamental right. The leading constitutional case in India of *Maneka Gandhi v. Union of India* AIR 1978 SC 597 held that a statutory provision would be struck down if "either it directly affects the fundamental rights or its inevitable effect on the fundamental rights is such that it makes their exercise ineffective or illusory" and this was followed by our Supreme Court. Therefore if the exercise of a fundamental right is "ineffective or illusory" by reason of any State action, then it is unconstitutional.

[23] With respect, I see little merit in this submission. Regulation 65(2) of the Trade Unions Regulations had been in existence ever since 1959 and the Court of Appeal as far back in 1997 had made a clear decision on the issue in the case of *Menteri Sumber*

A *Manusia & Ors v. Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar dan Restaurant Semenanjung Malaysia & Another Appeal* [1998] 1 CLJ 215.

[24] In that case which incidentally involved the same union as in this case before this court, the union had also contended that reg. 65(2) of the regulations provides for an unfair procedure and that the said provision should be struck down as offending arts. 5, 8 and 10 of the Federal Constitution.

[25] His Lordship Gopal Sri Ram JCA, (as he then was) in handing down the judgment of the court held as follows:

> There is in our judgment, on the facts of this case no unfair or unjust result by the application of the method prescribed by reg. 65(2). ... In our judgment, the workmen employed by the Hotel were entitled to exercise their franchise or to refrain from exercising it as they chose to. It was for them to decide whether the Union ought to represent them in the Hotel. In a democracy like ours, one of the most valuable rights is the right to vote as well as the right to withhold one's vote. Viewed from this broader perspective and taking into account a workman's right enshrined in arts. 5, 8 and 10 of the Federal Constitution, it is clear that there was no unreasonable decision in the Wednesbury's sense in this case.

[26] In that case the union had contended that the secret ballot process infringed art. 10 of the Federal Constitution. Disagreeing with that contention the court held as follows:

> Mr Thomas argued that the secret ballot procedure, when applied to the circumstances of the case, defeats the right of the Union and infringes the wholesome doctrine encompassed in art. 10 of the Federal Constitution. We respectfully do not agree. This is not a case where the workmen have been deprived of their right to livelihood or be associated with other in their trade. This Court in *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan And Another Appeal* [1996] 1 MLJ 481 has held that "life" in art. 5(1) of the Federal Constitution includes the right to livelihood. And we have *Tan Teck Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771 recognised the wide sweep of art. 8(1) of the Federal Constitution and the beneficial effects that it confers upon citizens of this country.

But as we have just observed, none of these constitutional provisions has been infringed by the decision of the Minister or the DGTU in the present instance. The constitutional provisions referred to by Mr Thomas are therefore not relevant to the appeals before us.

Issue (d)

[27] The applicant submitted that a reviewing judge ought to:

(a) question whether the decision was unreasonable in the sense in which the expression is understood in the administrative law; and

(b) having done so, and if had given an affirmative answer, then and only then only ought he have proceeded to consider the materiality or relevance of the failure on the part of the decision makes to provide reasons.

[28] According to the applicant, had the first respondent (the Minister) provided reasons for the impugned decision, the court would have been able to review the reasons to see if he had a rational reason for his decision. A failure of the first respondent to provide reasons in these circumstances infers that he had no good reason for reaching the impugned decision.

[29] The Industrial Relations Act 1967 and the Trade Union Act 1959 do not imposed a duty on the first respondent to provide a reasoned decision. This is further fortified by the following cases:

(i) *Joseph Puspam v. Menteri Sumber Manusia, Malaysia & Anor* [2001] 4 CLJ 252;

(ii) *Ramatex Textiles Industrial Sdn Bhd v. Menteri Sumber Manusia Malaysia & Anor* [2004] 8 CLJ 577;

(iii) *Minister of Labour, Malaysia v. Sanjiv Oberoi & Anor* [1990] 1 CLJ 44; [1990] 1 CLJ (Rep) 200; and

(iv) *Lee Chew Mee v. Ng Kok Kwang & Anor* [2010] 8 CLJ 192.

[30] Be as it may, the first respondent in his affidavit in reply at paras. 21 and 22 had given his reason as to why the fourth respondent should not grant recognition to the applicant. In his affidavit the first respondent had stated that in order for the fourth

respondent to grant recognition to the applicant, the applicant has to have a majority in the membership in the fourth respondent and the majority consist of employees of the fourth respondent who are entitled to join the applicant. But the result of the membership check by way of secret ballot shows that only 19.2% of the fourth respondent's employees had become members of the applicant. This means that the applicant had failed to obtain the membership majority.

[31] The affidavits of the second respondent, the third respondent and the first respondent all disclose that the latter has acted fairly, properly and reasonably in the exercise of his discretion in the matter under s. 9(5) of the Act and has taken all relevant matters into consideration and had sufficient evidence and material before him for the purposes of arriving at his decision.

[32] As stated in the case of *Menteri Sumber Manusia & Ors v. Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar dan Restaurant Semenanjung Malaysia & Another Appeal (supra)*:

> It is axiomatic that a reasonable decision may often produce a result that is adverse to one or more parties who are affected by it. An unfair result does not necessarily make a decision unreasonable because unfairness must be gauged by reference to the decision itself, which may or may not include the consequences of such decision, depending upon the circumstances of each case.

Conclusion

[33] The applicant essentially challenged the impugned decision as infringing arts. 5, 8 and 10 of the Federal Constitution. The grounds raised by the applicant had been ventilated and decided by the superior court. This court is bound by the principle of *stare decisis*.

[34] The court is satisfied held that the applicant has made out no case for interference with the impugned decision. Wherefore, the application is dismissed with costs.